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No. 678

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

GENERAL GEOPHYSICAL COMPANY, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Petitioner, General Geophysical Company, prays that this Court grant a rehearing of its order of April 16, 1962, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in the above-entitled cause as prayed for in the petition filed January 20, 1962, herein.

Reasons For Granting Rehearing And Issuing Writ

1. This first reason urged by us for a rehearing is a very substantial one and was not presented in our petition.

Under Rule 19 of this Court one of the strongest cases for granting certiorari is where the decision below is in conflict with decisions of this Court or those of other circuits. We respectfully submit that the decision of the Court of Appeals on the controlling point of law is in direct conflict with the holdings in *Evans Products Company v. Commissioner of Internal Revenue*, 84 F. 2d 998, (6th CCA), affirming 29 B.T.A. 992, cert. den. 298 U.S. 675; *Samuel Insull, Jr. v. Commissioner of Internal Revenue*, 32 B.T.A. 47; *American Bantam Car Company v. Commissioner of Internal Revenue*, 177 F. 2d 513 (3rd CCA), affirming *American Bantam Car Company v. Commissioner of Internal Revenue*, 11 T.C. 397, cert. den. 339 U.S. 920; *Portland Oil Company v. Commissioner of Internal Revenue*, 109 F. 2d 479 (1st CCA), cert. den. 310 U.S. 650; *Wilgard Realty Co., Inc. v. Commissioner of Internal Revenue*, 127 F. 2d 514 (2nd CCA), cert. den. 310 U.S. 655; and with the decision of the Fifth Circuit itself in *American Compress & Warehouse Co. v. Bender*, 70 F. 2d 655, cert. den. 293 U.S. 607, and with many other similar cases. They all involved the legal effect of a very brief ownership of property. They all recognized that brief ownership for tax purposes while the Court of Appeals in this case refused to recognize it.

Those cases arose under various Revenue Acts of which the controlling sections were similar in effect to sections 351 and 368(c)[1] of the 1954 *Internal Revenue Code*.

[1]SEC. 351. TRANSFER TO CORPORATION CONTROLLED BY TRANSFEROR.

(a) GENERAL RULE.—No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation and immediately after the exchange such person

Those sections provide that, where a party transfers property to a corporation for its stock and *immediately* thereafter is in control of the corporation, no gain or loss is to be recognized because of the transfer. Control is defined in substance as the ownership of 80% or more of the stock of the corporation.

The above cited cases and others have consistently held that, if the transferor owns 80% or more of the stock immediately after the transfer and is under no binding agreement to sell enough of the stock to bring him below the 80%, this satisfies the statute even though he immediately thereafter loses the 80% control by disposing of part of his stock or the corporation issues to others a large amount of stock.

In *Evans Products Company v. Commissioner of Internal Revenue*, 84 F. 2d 998, the Sixth Circuit in a per curiam opinion affirmed the Board of Tax Appeals "for the reasons stated in the board's opinion". In its opinion the Board stated (29 B.T.A. 992, 997):

> "The question then is whether E. S. Evans remained in control of the petitioner immediately after the transfer of the property from E. S. Evans & Co. to it.

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or persons are **in control** (as defined in section 368 (c)) of the corporation. For purposes of this section, stock or securities issued for services shall not be considered as issued in return for property." (Emphasis added).

SEC. 368. DEFINITIONS RELATING TO CORPORATE REORGANIZATIONS.

* * * * *

(c) CONTROL.—For purposes of part I (other than section 304), part II, and this part, the term "control" means the ownership of stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote and at least 80 percent of the total number of shares of all other classes of stock of the corporation.

> It is not essential that Evans should retain control for any length of time. It is sufficient that he was *momentarily* in control. Federal Grain Corp., 18 B.T.A. 242." (Emphasis added).

We will not take the space at this point to discuss and quote from all the cases cited above but we do take them up in detail in the appendix to this motion (page 13) and invite the Court's consideration thereof. We would like to quote at this point from *Wilgard Realty Co., Inc., v. C. I. R.*, 127 F. 2d 514 (2nd CCA), cert. den. 310 U.S. 655, as it is typical and explains the basis of all these decisions. On August 12, 1932, one Chamberlain conveyed certain property to the taxpayer corporation for 197 shares of its 200 shares. At that time he intended to give 156 shares to relatives and he did give them on the same day, thus reducing his stock ownership far below the required 80% for control. The Second Circuit, however, held this momentary control was sufficient saying on page 516:

> "Though it was plainly enough Mr. Chamberlain's intention to create the petitioner and to transfer his property to it for its stock and the assumption of his liability on the two mortgages in order to provide him with stock to give as he did to his relatives, *he was under no obligation to make the gift.* There is neither claim nor proof that he was bound to carry out his intention to give any of it away when he received the stock or that he was not free at any time up to the very moment he gave it away to change his mind and use it for any lawful purpose. This would, of course, include the use of it to control the petitioner for as long as he desired by virtue of stock ownership far in excess of the 80 per centum made enough under the statutory definition of control found in § 112 (h) of the Act.

"In the absence of any restriction upon his freedom of action after he acquired the stock, he had 'immediately after the exchange' as much control of the petitioner as if he had not before made up his mind to give away most of his stock and with it consequently his control. And that is equally true whether the transaction is viewed as a whole or as a series of separate steps. The transferor's freedom, at the time he acquired it, to keep the stock for himself is the basic distinction between this case and those like Bassick v. Commissioner, 2 Cir., 85 F. 2d 8; Hazeltine Corp. v. Commissioner, 3 Cir., 89 F. 2d 513; Heberlein Patent Corp. v. United States, 2 Cir., 105 F. 2d 965, upon which the petitioner relies. In those cases the recipient of the stock on the exchange had as a part of the transaction by which it was acquired, foregone or relinquished the right to have such control as its ownership would give and was bound upon receipt of the stock to dispose of it as previously arranged. But where the recipient of the stock on the exchange has not only the legal title to it 'immediately after the exchange' but *also the legal right then to determine whether or not to keep it with the control that flows from such ownership*, the requirements of the statute are fully satisfied. It is immaterial how soon thereafter he elects to dispose of his stock by gift or otherwise and whether or not such disposition is in accord with a preconceived plan not amounting to a binding obligation." (Emphasis added).

The facts in this case are exactly of the same kind as those in these reorganization cases as shown by the following quotations from the Court of Appeals' opinions, the first being from its original opinion and the second from its opinion on rehearing:

"Witnesses for the taxpayer insisted that there was no agreement between the corporation and the stockholders to re-exchange the corporate properties trans-

ferred to the stockholders in the redemption of their shares. The trial judge so found, and it seems clear that there was no legally binding agreement to that effect." (App. B, P. 35).

"We do not question the integrity of the parties or suggest that there was any flim-flam. We do not doubt the business purposes of the transaction. The decision does not purport to question the effectiveness of the transaction in protecting the stockholders against the holding in Robinson v. Wangeman, 5 Cir., 1935, 75 F. 2d 756. But we hold and reaffirm that *for tax purposes* there was not a sufficient severance of the corporation's ownership over the assets for the transaction to create the tax consequence that when the corporation reacquired the assets it took them with a stepped-up basis." (App. C, P. 44).

In our opinion there is obviously a direct conflict involved. In the reorganization cases the owner of the stock owned the stock free and clear of any commitment. In this case the Johnson estate and the widow owned these properties absolutely and were free to do with them as they chose. This status of short duration was given full effect in the reorganization cases and yet is denied in this case. While the facts of the reorganization cases differ from those in the present one, nevertheless, the underlying principles are the same and we submit these cases present such a conflict as should be resolved by this Court.

2. The decision of the court below is in direct conflict with that of the Second Circuit in *Jordan Marsh Company v. Commissioner of Internal Revenue*, 269 F. 2d 453 (1958). In the present case petitioner transferred certain properties to the Johnson estate and widow in retirement of their stock. It was agreed between petitioner and the estate and widow that the fair value of the properties was

$746,525. On the same day the estate and widow sold the properties to petitioner for $746,525. The evidence was uncontradicted that this was their fair value and the Government has never at any time contested that fact. Petitioner had no option or any other right to buy them back. The court below refused to recognize these transactions, saying in part (R. 40):

> "The transactions should be recognized as creating an interruption in the ownership of the assets sufficient to produce a new basis *only* when the corporation has made a clear and distinct severance of its ownership prior to the reacquisition.
>
> "The facts of these transactions will not support a holding that the corporation had terminated its ownership for these purposes. It parted with bare legal title to the property for a few short hours. It made no physical delivery of any of the assets. Its control and use of the property were never interrupted. Even the surrender of its legal title was made under circumstances creating a strong expectation that it would be returned shortly." (R. 40).

In direct conflict is the *Jordan Marsh* case. There the corporation sold the property for its full fair value. Then, in the words of the Second Circuit (269 F. 2d 454):

> "The conveyances were unconditional, without provision of any option to repurchase. At the same time, the petitioner received back from the vendees leases of the same properties for terms of 30 years and 3 days, with options to renew for another 30 years if the petitioner-lessee should erect new buildings thereon."

The corporation deducted a loss as the sale was for less than its cost. The Commissioner's position was that under

his regulations 30 year leases are treated the same as fee titles and therefore this was an exchange of like properties —fee for a 30 year lease—in which no gain or loss is recognized. The Court said on pages 455 and 456:

> "Upon this appeal, we must decide whether the transaction in question here was a sale or an exchange of property for other property of like kind within the meaning of §§ 112(b) and 112(e) of the Internal Revenue Code cited above. * * *
>
> "The Tax Court apparently thought it of controlling importance that *the transaction in question involved no change in the petitioner's possession of the premises:* it felt that the decision in Century Electric Co. v. Commissioner of Internal Rev., supra, controlled the situation here. We think, however, that that case was distinguishable on the facts. For notwithstanding the lengthy findings made with meticulous care by the Tax Court in that case, 15 T.C. 581, there was no finding that the cash received by the taxpayer was the full equivalent of the value of the fee which the taxpayer had conveyed to the vendee-lessor, and no finding that the lease back called for a rent which was fully equal to the rental value of the premises." (Emphasis added).

The Second Circuit then held there was no exchange and that, even though the corporation's possession of the property was never interrupted, nevertheless there was a completed sale that must be recognized and allowed the corporation the claimed loss. Incidentally, in its opinion the Second Circuit relied heavily on *Portland Oil Co. v. Commissioner of Internal Revenue*, 109 F. 2d 479, which we cite above and discuss in the appendix hereto.

The Government did not apply for certiorari in the *Jordan Marsh Company* case, but stated in Rev. Rul. 60-

43, 1960-1 C.B. 687, that it would not follow that case. We submit that this is a proper time and place for that conflict to be reconciled by this Court.

3. One of the most frequent grounds upon which this Court grants writs of certiorari is in cases where there are conflicting decisions among the Courts of Appeals. Where there is no such conflict, our experience is that it is most difficult to obtain a writ of certiorari, as shown in the footnote below.* However, we note another ground for granting certiorari as set out by this Court in *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U.S. 47, 50:

> "Petition for certiorari raising the question, among others, whether the Court of Appeals had erred in holding patentable a combination including one ele-

*In **Group No. 1 Oil Corporation v. Bass**, 283 U.S. 279 (1931), our petition was at first denied, 282 U.S. 877, and then on the intervention of the State of Texas was granted, 282 U.S. 830. (While the case was decided against us by Justice Stone, he one year later in his dissenting opinion in **Burnet v. Coronado Oil & Gas Company**, 285 U.S. 393, 403, stated that the distinction on which he had decided against us was actually not a valid distinction.)

In **Rickert Rice Mills, Inc. v. Fontenot**, 79 F.2d 700, cert. granted 296 U.S. 569, lower court reversed, 297 U.S. 110 (1936), certiorari was granted because of the pendency of **United States v. Butler**, 297 U.S. 1.

In **Haden Co. v. Commissioner of Internal Revenue**, 118 F.2d 285 (1941), we lost to the Government in the Fifth Circuit and certiorari was denied, 314 U.S. 625. The next year the Seventh Circuit in **American Dental Co. v. Commissioner of Internal Revenue**, 128 F.2d 254, decided the same point involved against the Government. This Court granted certiorari, 317 U.S. 612, and affirmed the Seventh Circuit, 318 U.S. 322, thus sustaining the position we had unsuccessfully urged in the Fifth Circuit.

We lost **Kirby Petroleum Co.**, 118 F.2d 80 (5 CCA 1940), and obtained certiorari, 325 U.S. 847, only because of a conflicting decision by the Ninth Circuit one month later in **Commissioner of Internal Revenue v. Crawford**, 118 F.2d 770. This Court in 326 U.S. 599 held in our favor, reversing the Fifth Circuit and affirming the Ninth Circuit.

ment not described in the original application for the Gulick patent and later added to it by amendment, and not described at all in the Maynard patent, was at first denied, there being no conflict of decision. 303 U.S. 639. We later granted certiorari, 304 U.S. 587, on a petition for rehearing showing that, notwithstanding the doubtful validity of the patents, litigation elsewhere with a resulting conflict of decision was improbable because of the concentration of the automobile industry in the sixth circuit. Cf. Paramount Publix Corp. v. American Tri-Ergon Corp., 294 U.S. 464; Altoona Publix Theatres v. American Tri-Ergon Corp., 294 U.S. 477."

We submit this ground in the event that this Court should hold there is not a sufficient conflict with the cases pointed out hereinabove for it to grant certiorari.

We know of no decision in any other circuit like that of *Robinson v. Wangeman*, 75 F. 2d 756, in the Fifth Circuit. Of course the *Robinson* case is binding upon all attorneys advising clients in the Fifth Circuit. We, and we assume other attorneys in that circuit, will continue to advise clients not to take notes in retirement of stock but to accept only cash or properties. They will then be faced for tax purposes with this decision. In the absence of any decision in other circuits like the *Robinson* case we doubt if this bankruptcy point would be widely known and it is doubtful if a case similar to this one will arise in any other circuit.

We are convinced that the Court of Appeals was wrong. If this Court should hold that there is not a sufficient conflict in the cases referred to above in our first reasons, then it should grant certiorari as it is extremely doubtful if there will be for years to come the requisite conflict.

4. We again urge this Court to grant our petition because of the importance of the principles involved. We

have been working with the income tax laws since the 1918 Revenue Act in 1920, and we know of no other case involving points that should be settled by this Court of any greater importance. We feel that this case has been erroroneously prejudged as if there were a well laid plan to save taxes just because petitioner did in this case get a tax break. However, there may be many similar cases where there would be no tax advantage. It must be remembered that both lower courts held the transactions were carried out for bona fide business reasons and not as a tax dodge.

Let us illustrate: Suppose land was involved upon which depreciation is not allowed. Original cost $50,000. Due to decline in value it is worth $40,000 when distributed and is bought back for $40,000. Under this case the company's cost is still $50,000 but we submit it is only $40,000 and we venture to say that, if the Company later sold it for $45,000 and tried to take a loss of $5,000, the Government would take a stand just the reverse of its stand in this case and claim the company's cost was $40,000 and the company made a taxable profit of $5,000 on the later sale.

Furthermore, this case in holding that transactions actuated, as the lower court said, for purely "business purposes" will not be recognized for income tax purposes opens the door to the Government and its revenue agents, particularly in the Fifth Circuit, to apply this novel and insupportable proposition to the widest range of cases where additional taxes will thereby result with needless resulting confusion in the administration of the taxing laws.[3]

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[3]Endless examples could be given illustrating the extent to which the personnel in the Internal Revenue Service, which personnel is continuously changing with new agents coming in yearly, seize upon decisions and cause interminable litigation. Take for

Conclusion

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

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example **Gregory v. Helvering**, 293 U.S. 465, a perfectly sound decision as a sham was involved. Yet the Service invokes it even in the most hopeless cases. It was relied upon below in this case. The Service misinterpreted **Commissioner v. Tower**, 327 U.S. 280, and **Lusthaus v. Commissioner**, 327 U.S. 293, and years and floods of family partnership litigation followed until this Court in **Commissioner v. Culbertson**, 337 U.S. 733, pointed out the true tests to be applied. We personally were caught in that partnership litigation, including **Scofield v. Mauritz**, 206 F.2d 135 (1953), and **Scofield v. Davant**, 218 F.2d 486 (1955). Again the Service seized upon **Commissioner v. Court Holding Co.**, 324 U.S. 331, and widespread litigation resulted until this Court spoke in **United States v. Cumberland Public Service Co.**, 338 U.S. 451, and Congress enacted section 337 of the 1954 Internal Revenue Code. We fear for the resulting litigation if the decision of the lower court in this case is allowed to stand.

APPENDIX

One of the earliest, and the leading one, of these reorganization "control" cases was Samuel Insull, Jr., 32 B.T.A. 47 (1935). On January 11, 1929, the Insulls transferred to a corporation certain properties for all of its stock. They and a broker had already worked out a plan whereby the corporation would sell to the broker additional shares which would bring the Insulls below the 80% but there was no binding agreement. Seven days later on January 18, 1929, the Corporation did sell the additional shares. The Board held, however, that the Insulls were in control for seven days, saying on page 55:

> "From the above facts it is clear that the agreement by which Halsey, Stuart & Co. was to acquire the debentures and the prior preferred stock of Insull Utility Investments, Inc., was no part of the exchange transaction or contract by which the petitioners and Martin J. Insull transferred their shares of stock to Insull Utility Investments, Inc. Clearly, 'immediately after the exchange' the transferors were in control of Insull Utility Investments, Inc., and remained in control of it until after January 18, 1929. What happened on and after that date has no bearing upon the question in issue."

The Commissioner of Internal Revenue has long since acquiesced in this case. XV-1 C.B. 12.

In *American Bantam Car Company v. Commissioner of Internal Revenue*, 177 F. 2d 513 (3rd CCA), cert. den. 339 U.S. 920, the Third Circuit in a per curiam opinion affirmed the Tax Court "for the reasons well stated by Judge Hill for the Tax Court in banc". The Tax Court had said in part (11 T.C. 397, 404):

> "The first question, then, is whether the associates had such 'control' over the petitioner immediately

after the exchange on June 3, 1936. Prima facie, when the various steps taken to organize the new corporation and transfer assets to it are considered separately, the associates did have 'control' of the petitioner immediately after the exchange within the statutory definition of the word. We think that from June 3 to June 8, 1936, they owned 100 per cent of all the issued stock, and from June 8, 1936, until October 1937 they owned stock possessing at least 80 per cent of the total combined voting power of all classes of stock. On June 3, 1936, the associates were issued absolutely and unconditionally 300,000 shares of no par common stock. The resolution of the board of directors of petitioner accepting the associates' offer of the Austin assets attached no strings whatsoever to the issuance of the stock to them. It is true that on June 2, 1936, petitioner had an authorized capital stock of 700,000 shares, 600,000 common shares and 100,000 preferred shares, but in determining control only stock actually issued is considered. Louangel Holding Corporation v. Anderson, 9 Fed. Supp. 550. On June 8 no other common stock had been issued, and a contract regarding possible future assignment of those 300,000 shares already issued was not entered into before that date. No preferred stock had been issued on June 3, nor was a contract for its sale provided until June 8. The statutory words 'immediately after the exchange' require control for no longer period; *in fact, momentary control is sufficient.* Evans Products Co., 29 B.T.A. 992. Certainly, therefore the associates had absolute control over the corporation from June 3 to June 8, 1936, due to their complete ownership of all outstanding stock." (Emphasis added).

Portland Oil Co. v. Commissioner of Internal Revenue, 109 F. 2d 479 (1st CCA), cert. den. 310 U.S. 650, was a slightly involved fact case, but the question was whether, where a corporation Bu-Vi-Bar received stock in another

corporation in one of these tax free "control" reorganizations, the tax free status was lost because Bu-Vi-Bar lost control by immediately distributing the stock to its stockholders. The Court held it did not, saying on page 490:

> "Upon receipt of petitioner's stock on December 30, 1930, Bu-Vi-Bar was under no obligation to sell it to third persons. Furthermore, under the particular facts of this case, Buell and Herndon, Bu-Vi-Bar's sole stockholders, without wrong to anyone, could have then elected to maintain the corporate existence of Bu-Vi-Bar, either as a holding company or as an operating company in the 'wild-cat' end of the oil business, leaving the more conservative operations to petitioner 'with a clean bill of health.' Had they so chosen, Section 112 (b) (5) would clearly have applied to Bu-Vi-Bar's previous transfer of the installment contract to petitioner. The fact that they chose to cause the dissolution of Bu-Vi-Bar in no way affected the integrity of that previous transfer, nor did it make any less applicable the underlying reason why that transfer should not involve the recognition of gain or loss."

In American Compress & Warehouse Co. v. Bender, 70 F. 2d 655, 657, the Fifth Circuit itself said in one of these "control" cases:

> "It is not material that at a time subsequent to the consummation of the exchange of property solely for corporate stock the transferor corporations ceased to be in control of the transferee corporation."

It is interesting to note that the Board of Tax Appeals in the Insull case, supra, said at 32 B.T.A. 56:

> "This rule was adopted in American Compress & Warehouse Co. v. Bender, 70 Fed. (2d) 655, cited by the Board in Ared Corporation, 30 B.T.A. 1080."